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Presiding Disciplinary Judge
Arizona Supreme Court
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IN THE SUPREME COURT OF ARIZONA

In the Matter Of)	
)	
AMENDED PETITION TO AMEND)	
THE RULES OF THE SUPREME)	Arizona Supreme Court No. _____
COURT OF ARIZONA)	
)	
_____)	

Pursuant to Rule 28, Rules of the Supreme Court, the Honorable William J. O'Neil, Presiding Disciplinary Judge of the Supreme Court of Arizona, submits his amended petition to adopt amendments to Rule 47, 48, 51, 56, 57, 58, 59, 60, 61, 63 and 72 the *Rules of the Supreme Court of Arizona* as reflected in the accompanying Appendix A.

I. INTRODUCTION

The original petition was filed on April 30, 2013, well past the time for the Court's consideration of it within the Court's 2013 review cycle. That delay was intentional. This petition contains multiple proposed changes that have arisen as hearings are conducted that are needed. More than three years have passed since the system has been implemented. During the course of that time, multiple issues of inconsistency or needed clarification have surfaced. The original petition informed the court that an additional petition would likely follow. Rather than an additional petition these amended proposals are needed.

The Office of the Presiding Disciplinary Judge is primarily guided by the disciplinary rules set forth within the Rules of the Arizona Supreme Court or other rules incorporated into

those rules (See Rule 47) and case law. Clarity and direction for this process are critical. The interest of the public and the profession would be served by amending this rule expeditiously.

II. SUMMARY OF THE PROPOSED AMENDMENT

Rule 47(a). Addresses a frequent occurrence when an unrepresented respondent does not properly answer the complaint by informing the respondent of this already existent requirement.

Rule 47(d). This change removes the inapplicable aspects of the incorporated civil rule. The concept of summary judgment is retained but without the incorporated time requirements of Civil Rule 56 that preclude the actual consideration of such a motion.

Rule 48. Multiple civil rules are incorporated into the disciplinary process. However some of these rules are not appropriate under the present disciplinary system. In these matters there is a strict time line for completion of the hearing within 150 days. Unlike in a civil matter, the parties in a disciplinary matter have full opportunity to participate, be involved and informed of the matter, even through the probable cause determination. In short there is no surprise. The deleted rules assure a speedy process without loss of due process as the parties are afforded notice well in advance of the complaint. The other additions offer guidance to the parties through the incorporation of aspects of the civil rule pre-trial conference tools.

Rule 51(c). While the power to stay a matter may be inherent, it is better stated clearly within the rule.

Rule 51(d). Presently there is no stated process by which a change of judge for cause is conducted. The civil rule addressing change of judge for cause has not been incorporated into the discipline rules. This rule change will bring clarity and a clear process to follow.

Rule 56. This rule addresses diversion agreements. The rule as presently exists does not expressly authorize the entry of a diversion agreement after probable cause has been found but before the complaint is filed. This amendment expressly permits that process.

Rule 57. A complainant has a right to be informed of an agreement for consent. Notifying the presiding disciplinary judge that there has been proper notice will speed the consideration of these agreements.

To preclude collateral appeals of the probable cause committee, notice should be provided to the presiding disciplinary judge when the same agreement is proposed. That does not preclude consideration of it.

Under the prior system, a report and recommendation was made in all cases. Unfortunately the correction to the language of that system was overlooked in the prior rule petition. The presiding disciplinary judge does not issue a report for agreements of discipline but rather a decision. Further disbarment by consent no longer requires multiple copies as it is filed with the disciplinary clerk. These amendments clarify that process.

Rule 58. The form of the caption has been changed to appear most consistent with that of this court.

In a prior request to amend the default rule the Court declined to adopt the recommendations of ARC and instead expanded the time for the effective date of default beyond what is existent within the civil rules. In short, lawyers facing discipline are granting time to respond which is beyond what the public would receive. There are two proposals submitted. One removes the default process and is preferred by your petitioner. The second proposal more closely mirrors the civil rule and times the effective date of a default from the filing, rather than the service of the entry of default.

As pointed out above, unlike in a typical civil case, the parties have every opportunity to be informed of the proceedings and typically participate actively. A respondent is notified of the opportunity to submit information to the Attorney Probable Cause Committee. There appears to be no profession in Arizona that has a “default” process. While most respondents timely file a response, there are also those individuals who delay the proceedings through the default process.

All respondents are lawyers. They are told in writing of the deadline for their answer. In civil proceedings the default rule properly protects a member of public who might not fully appreciate the aspect of a deadline for response and gives a double warning. All respondents are lawyers. A double warning of a deadline is not needed. The present rule grants to lawyers more time in the default system than a member of the public receives in a civil case. The delay is not warranted, nor appropriate. The rule allows a party to request additional time by motion.

Other amendments include removing the term “report” and replacing it with “judgment”. The disciplinary system now uses a recording system rather than a court reporter. The amendment proposed clarifies the duty of the disciplinary clerk regarding the record.

Rule 59. Corrections are proposed to again replace the word report with the term judgment.

Rule 60. The proposed change sets forth more specific requirements for the reporting of an alleged violation and makes clear the report is to be served upon the respondent. The change will permit the presiding disciplinary judge full discretion on how to proceed with such a report including declining to proceed with further action.

The final amendment within this rule makes clear it is the presiding disciplinary judge who enters a judgment, not the hearing panel.

Rule 61. The prior changes make clear that the presiding disciplinary judge may issue interim suspension orders and changes the caption accordingly. These changes also correct the language which again uses “report” when the PDJ makes a decision involving interim suspension.

The proposed rule authorizes the presiding disciplinary judge to review a motion for interim suspension and deny the motion without hearing. Presently the rule requires hearings even when the motion does not meet the threshold for warranting such a hearing.

Rule 63. These changes better clarify the process involved with the PDJ on matters of incapacity and authorize the probable cause committee to recommend the filing of a petition alleging a lawyer to be incapacitated.

Rule 72. The change recommends that a copy of the affidavit required under this rule be filed with the presiding disciplinary clerk, in addition to this court.

III. CONCLUSION

The approval of this procedural amendment offers clarity, greater consistency, and procedural guidance to the discipline process. It is offered with the intent to better protect the public we serve, the profession, and the respondent attorneys who appear before the PDJ. This proposed amendment will better assure all involved of an effective, uniform and timely resolution of temporary suspension requests.

DATED this 10th day of January 2014.

William J. O'Neil

William J. O'Neil
Presiding Disciplinary Judge
Supreme Court of Arizona

ORIGINAL ELECTRONICALLY filed
with the Clerk of the Arizona Supreme Court
this 10th day of January 2014:

APPENDIX A

ARIZONA RULES OF THE SUPREME COURT

Rule 47. General procedural matters.

(a) *Pleadings*. There may be a complaint, an answer, an amended complaint, and an answer to an amended complaint. No other pleadings may be filed unless permitted by these rules or otherwise permitted by the presiding disciplinary judge, the hearing panel, or the court. All answers shall fairly meet the substance of the averments.

Rule 47. General procedural matters.

(d) *Motions*. Procedural or substantive motions may be filed and must comply with the requirements of Rule 7.1(a) and, Rule 12(b), (c), (d) and (f), and Rule 56, Ariz. R. Civ. P., as may be applicable to these proceedings. The following defenses may at the option of the pleader be made by motion.

1. Lack of jurisdiction over the person.
3. Improper venue.
4. Insufficiency of process.
5. Insufficiency of service of process.

A motion by any party shall be filed no later than the dispositive motion deadline set by the presiding disciplinary judge or in the absence of such a deadline, 45 days before the date set for hearing. Upon timely request by any party, the presiding disciplinary judge may set a time for hearing on any motion, provided, however, the presiding disciplinary judge need not conduct a hearing. A party may move for judgment on the pleadings or a motion for summary ruling regarding any or all counts of the complaint, identifying each count or defense - or the part of each count or defense - on which summary ruling is sought as a matter of law. The Presiding Disciplinary Judge may grant a summary ruling only if as a matter of law it should be granted. The presiding disciplinary judge shall state for the record the reasons for granting the motion. A party opposing such a motion must file its response and any supporting materials within 20 days after service of the motion. The moving party shall have 5 days after service of the response in which to serve a reply memorandum and any supporting materials. These time periods may be shortened or enlarged by a filed stipulation of the parties or by court order; provided, however, that court approval is required for any stipulated extensions to a briefing schedule that would purport to make a reply or other memorandum due less than five days before a hearing date previously set by the court, or would require postponement of a scheduled hearing date or other modifications to an existing case scheduling order.

Motions for sanctions are governed by Rule 58(f)(3) of these rules. All motion practice shall be subject to the provisions of Rule 7.1(b), Ariz.R.Civ.P.

Rule 48. Rules of construction.

(a) *Nature of proceedings.* Discipline and disability proceedings are neither civil nor criminal, but are sui generis.

(b) *Rules of Civil Procedure.* Only the following Arizona Rules of Civil Procedure are applicable to discipline and disability proceedings before the presiding disciplinary judge or the hearing panel, as specifically set forth in these rules: Rules 4, 4.1, 4.2, 5, 5(f), ~~5.16(a), 6(e), 7.1(a), 7.1(b), 8(b), 8(d)(f), 10(b)-(d), 11(a), 12(b), 12(c), 12(e), 12(f), 16(a), and (d)(2)(A-E)(J), 16(f), 26(a)-(f), 29-36, 38.1(i), 38.1(j), 42(a), 43-45, 56, 60(c), 80(a), 80(d), 80(h), and 80(i).~~ In addition, Rules 6(c) and 13 of the Arizona Rules of Civil Appellate Procedure shall apply as specified in Rule 59.

Rule 51. Presiding disciplinary judge.

(c) *Powers and duties of the presiding disciplinary judge.* The presiding disciplinary judge shall be authorized to act in accordance with these rules and to:

1. appoint a staff in accordance with an approved budget as necessary to assist the presiding disciplinary judge in the administration of the judge's office and in the performance of the judge's duties;
2. order the parties in disciplinary proceedings to attend a settlement conference;
3. impose discipline on an attorney, transfer an attorney to disability inactive status, and serve as a member of a hearing panel in discipline and disability proceedings, as provided in these rules;
4. stay a matter for good cause, shorten or expand time limits set forth in these rules, as the presiding disciplinary judge, in the exercise of discretion, determines necessary;
5. enlist the assistance of members of the bar to conduct investigations in conflict cases;
6. periodically report to the court on the operation of the office of the presiding disciplinary judge;
7. recommend to the court proposed changes or additions to the rules of procedure for attorney discipline and disability proceedings; and
8. adopt such practices as may from time to time become necessary to govern the internal operation of the office of the presiding disciplinary judge, as approved by the supreme court.

Rule 51(d)

Change of Presiding or Acting Presiding Disciplinary Judge for Cause. The presiding or an acting presiding disciplinary judge shall not be subject to disqualification for cause by the parties to a proceeding except as provided in Rule 2.11 of the Arizona Code of Judicial Conduct. Any motion to disqualify the presiding or an acting presiding disciplinary judge for cause shall be supported by an affidavit specifically alleging the grounds for disqualification. A motion and affidavit shall be timely if filed within fourteen days after discovery that grounds exist for the disqualification of the judge pursuant to Rule 2.11. No event occurring before such discovery shall constitute a waiver of the right to move for a change of judge under this rule. The disciplinary clerk shall designate a volunteer attorney member from the hearing panel pool to decide the motion and to determine by a preponderance of the evidence whether the motion has been timely filed and, if so, whether cause exists based solely on the motion and the other party's response to proceed to an evidentiary hearing. If not, the motion shall be summarily denied and the matter shall be assigned back to the presiding or acting presiding disciplinary

judge. Otherwise, an evidentiary hearing shall be held. Following the hearing, depending on the ruling of the assigned hearing panel member, the disciplinary clerk shall assign the matter back to the presiding or acting presiding disciplinary judge or reassign the matter to another acting presiding disciplinary judge.

~~*Change of presiding disciplinary judge for cause.* The presiding disciplinary judge shall not be subject to removal by the parties to a proceeding except upon the grounds set forth in A.R.S. 12-409(B). Any request to remove the presiding disciplinary judge for cause shall be filed as soon as the grounds for removal are discovered. The disciplinary clerk shall designate a volunteer attorney member from the hearing panel pool to hear the matter and to decide by a preponderance of the evidence whether cause exists. Following the hearing, depending on the findings of the assigned hearing panel member, the matter shall be reassigned to the presiding disciplinary judge or referred to the disciplinary clerk for designation of an acting presiding disciplinary judge.~~

Rule 56

(c) *Diversion agreement or order.* If diversion is offered and accepted prior to an investigation pursuant to Rule 55(b), the agreement shall be between the attorney and the state bar. If bar counsel recommends diversion after an investigation pursuant to Rule 55(b) but before authorization to file a complaint, the recommendation for an order of diversion shall be submitted to the committee for consideration. If the committee rejects the recommendation, the matter shall proceed as otherwise provided in these rules. If diversion is offered and accepted after authorization to file a complaint ~~has been filed~~, the matter shall proceed pursuant to Rule 57. If the presiding disciplinary judge rejects the diversion agreement, the matter shall proceed as provided in these rules.

Rule 57. Special discipline proceedings.

(a)(2)(D) General Language

(v) a statement that the agreement has been approved as to form and content by the chief bar counsel or chief bar counsel's designee.

(vi) a statement that the duty to advise complainant of the agreement for discipline has been complied with and what, if any, objection has been timely submitted by the complainant.

Rule 57.

(a)(3)(A) Procedure

A. If the parties reach an agreement before the authorization to file a formal complaint and the agreed upon sanction does not include a reprimand, suspension, or disbarment, the parties may elect to request an order pursuant to Rule 55(c) by providing to the committee for its review an investigative report and bar counsel's recommendation for an admonition, probation, restitution, or an assessment of costs and expenses. Alternatively, the parties may submit an agreement for discipline by consent with all supporting exhibits to the committee for its review. The committee shall either reject the request or agreement and order the proceedings continued in accordance with these rules, or accept the request or agreement and issue the appropriate order. In the event the agreement is rejected, the same agreement shall not be presented, without written notification of that rejection, to the presiding disciplinary judge.

Rule 57

(a)

4. *Presiding disciplinary judge ~~report~~decision.* Within thirty (30) days of the submission of an agreement or the conclusion of hearing, if one is held, and receipt of the transcript, if any, the presiding disciplinary judge shall file a report decision with the disciplinary clerk and serve a copy on the parties. The report decision shall accept, reject or recommend modification of the proposed agreement. The report decision shall incorporate all or portions of the agreement, as appropriate.

5. *Disbarment by consent.* The following provisions shall apply to admissions that constitute disbarment by consent:

A. Any member against whom charges have been made or a formal complaint filed may voluntarily consent to disbarment by filing with the disciplinary clerk, ~~in duplicate original, a~~ an original, written, verified consent to disbarment in the form prescribed in these rules or as otherwise approved by the court. The consent to disbarment shall be effective only upon acceptance by the presiding disciplinary judge. The general form of consent to disbarment shall be as follows:

Rule 58. Formal proceedings.

(a) *Complaint.* Formal discipline proceedings shall be instituted by the state bar filing a complaint or agreement for discipline by consent with the disciplinary clerk. The complaint shall be sufficiently clear and specific to inform a respondent of the alleged misconduct. The existence of prior sanctions or a prior course of conduct may be stated in the complaint if the existence of the prior sanction or course of conduct is necessary to prove the conduct alleged in the complaint.

1. *Form.* The complaint and all subsequent pleadings filed before the presiding disciplinary judge should be captioned as set forth below:

~~BEFORE THE PRESIDING DISCIPLINARY JUDGE~~
~~IN THE~~
~~SUPREME COURT OF THE STATE OF ARIZONA~~
BEFORE THE OFFICE OF THE PRESIDING DISCIPLINARY JUDGE
1501 W. WASHINGTON, SUITE 102, PHOENIX, AZ 85007-3231

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Rule 58. Formal proceedings. (default)

Alternative 1.

(b) *Answer.* Respondent shall file an answer with the disciplinary clerk and serve copies upon bar counsel of record within twenty (20) days after service of the complaint, unless, upon written request by respondent, the time is extended by the presiding disciplinary judge. The presiding disciplinary judge may grant one extension of time, not to exceed thirty (30) days. Respondent shall provide a current address in his or her answer, and confirm that the address given is the address reported to the state bar pursuant to Rule 32(c)(3). A respondent's answer must comply with Rule 8(b), Ariz.R.Civ.P. If respondent fails to answer within the prescribed time, the allegations in the complaint shall be deemed admitted and the presiding disciplinary judge shall schedule an aggravation/mitigation hearing before the hearing panel. Not less than fifteen (15) days before the date set for the aggravation/mitigation hearing, the presiding disciplinary judge shall serve notice of the hearing on the parties. The hearing shall be held not earlier than fifteen (15) days nor later than thirty (30) days after the entry of default. The hearing panel shall prepare a report as provided in paragraph (k) of this rule.

(c) *Initial case management conference.* Within ten (10) days after an answer has been filed, the presiding disciplinary judge shall contact the parties and hold a mandatory case management conference for purposes of establishing the discovery schedule, as well as scheduling the hearing on the merits and all other prehearing conferences, unless a notice of agreement for discipline by consent or an agreement for discipline by consent has been filed. Bar counsel and respondent, and respondent's counsel, if any, shall appear for the initial case management conference. The parties may participate in the conference telephonically or by other appropriate electronic means.

~~(d) *Default procedure; aggravation/mitigation hearing.* If respondent fails to answer within the prescribed time, the disciplinary clerk shall, within ten (10) days thereafter, enter that party's default and serve a copy of the notice of default upon respondent and bar counsel. A default entered by the disciplinary clerk shall be effective ten (10) days after service of the notice of default, upon which the allegations in the complaint shall be deemed admitted. A default shall not become effective if the respondent pleads or otherwise defends within ten (10) days from the service of the notice of default. Entry of default shall not be set aside except in cases where such relief would be warranted under Rule 60(c), Ariz.R.Civ.P. The presiding disciplinary judge shall schedule an aggravation/mitigation hearing before the hearing panel. Not less than fifteen (15) days before the date set for the aggravation/mitigation hearing, the presiding disciplinary judge shall serve notice of the hearing on the parties. The hearing shall be held not earlier than fifteen (15) days nor later than thirty (30) days after the entry of default. The hearing panel shall prepare a report as provided in paragraph (k) of this rule.~~

Alternative 2.

(d) Default procedure; aggravation/mitigation hearing. If respondent fails to answer within the prescribed time, the disciplinary clerk shall, within ten (10) days thereafter, enter that party's default and serve a copy of the notice of default upon respondent and bar counsel. A default entered by the disciplinary clerk shall be effective ten (10) days after ~~service entry~~ of the ~~notice of~~ default, upon which the allegations in the complaint shall be deemed admitted. A default shall not become effective if the respondent files an answer ~~or otherwise defends~~ within ten (10) days from the ~~service entry~~ of the ~~notice of~~ default.

Rule 58. Formal proceedings.

(k) ~~Report Decision~~. Within thirty (30) days after completion of the formal hearing proceedings or receipt ~~of the transcript, post hearing memorandums,~~ whichever is later, the hearing panel shall prepare and file with the disciplinary clerk a written ~~report decision~~ containing findings of fact, conclusions of law and an order regarding discipline. ~~The disciplinary clerk shall preserve the together with a~~ record of the proceedings. Sanctions imposed shall be determined in accordance with the American Bar Association *Standards for Imposing Lawyer Sanctions* and, if appropriate, a proportionality analysis. The ~~report judgment~~ shall be signed by each member of the hearing panel. Two members are required to make a decision. A member of the hearing panel who dissents shall also sign the ~~report judgment~~ and indicate the basis of the dissent in the ~~report judgment~~. The disciplinary clerk shall serve a copy of the ~~report judgment~~ on respondent and on bar counsel of record. The hearing panel shall notify the parties when the ~~report judgment~~ will be filed outside the time limits of this rule and shall state the reason for the delay. The decision of the hearing panel is final, subject to the parties' appeal rights as set forth in Rule 59.

Rule 59. Review by the court [Effective until January 1, 2014].

(a) *Notice of appeal*. Within ten (10) days after service of a ~~report decision~~ of the presiding disciplinary judge, except reports regarding consent agreements, or a hearing panel, denial of reinstatement, respondent or the state bar may appeal by filing with the disciplinary clerk a notice of appeal and serving a copy on the opposing party. An opposing party may file a notice of cross-appeal within ten (10) days from service of the notice of appeal and serve a copy on the opposing party.

(b) *Extension of appeal time*. The presiding disciplinary judge may, upon motion filed not later than 30 days after the expiration of the time for appeal and a showing of excusable neglect, extend the time for filing the notice of appeal for a period not to exceed fourteen (14) days from the date of the order granting the motion.

(c) *Stay pending appeal*. A respondent may seek a stay of the decision of the hearing panel by filing a request with the hearing panel within ten (10) days of the date the ~~report decision~~ was filed.

Rule 60. Disciplinary sanctions.

(a)(5)(C) *Types and forms of sanctions*.

The state bar shall be responsible for monitoring and supervising the respondent during the probationary period. The state bar shall report material violations of the terms of probation to the presiding disciplinary judge, which ~~report shall be served upon respondent. The report shall be accompanied by verification or separate affidavit based upon knowledge, stating sufficient facts to support the material violations of the terms of probation. Upon filing the report, the presiding disciplinary judge may issue an order setting the matter for status conference or, granting~~

respondent ten calendar days to respond to the report or, issue an order declining to proceed or, may hold a hearing within thirty (30) days to determine if the terms of probation have been violated and if an additional sanction should be imposed. In a probation violation hearing, a violation must be proven by a preponderance of the evidence. At the end of the probation term, bar counsel shall prepare and forward a notice to the presiding disciplinary judge regarding the respondent's completion or non-completion of the imposed terms.

Rule 60. Disciplinary sanctions.

(b)(2) (A) *Procedure.*

A. Upon final order of the presiding disciplinary judge or the hearing panel. If the disciplinary sanction ordered by the presiding disciplinary judge or the hearing panel is not appealed, the state bar shall file a final statement of costs and expenses with the disciplinary clerk within five (5) days after the time to appeal has expired. At the same time, the disciplinary clerk shall file a statement reflecting the costs and expenses of that office in connection with the proceeding. The respondent shall file any objections to the statements of costs and expenses within ten (10) days of service. The state bar may file a response within five (5) days of service of the objection. Unless otherwise ordered, objections shall be determined on the pleadings without oral argument or an evidentiary hearing. The presiding disciplinary judge or the hearing panel shall rule on any objections to costs and expenses, enter an appropriate order, file the same with the disciplinary clerk and serve a copy on the bar counsel of record and respondent or respondent's counsel. The respondent or state bar may appeal a decision on the assessment of costs and expenses as set forth in Rule 59. If no appeal is timely filed, the presiding disciplinary judge shall issue a judgment which includes costs.

Rule 61. Interim suspension by the court or the presiding disciplinary judge.

(c)(2)(B)

2. All other grounds for interim suspension. The state bar may file a motion for interim suspension with the presiding disciplinary judge. The motion shall be accompanied by verification or separate affidavit upon personal knowledge stating sufficient facts to support the requested suspension, and shall include a copy of any related hearing panel ~~report~~decision.

B. Hearing. After receiving the response or after the time for filing a response has passed, the presiding disciplinary judge may deny the motion or shall, within ten (10) days, conduct an evidentiary hearing, unless the parties have stipulated to the entry of an order of interim suspension. The state bar shall have the burden of establishing probable cause that the basis of the requested relief exists and that interim suspension is appropriate. The presiding disciplinary judge is not bound by common law or rules of evidence or by technical or formal rules of procedure and may conduct the hearing in any manner that will achieve substantial justice. Respondent shall have the right to present evidence, cross-examine witnesses, and be represented by counsel. Within five (5) days after the matter is deemed submitted or a hearing is held, the presiding disciplinary judge shall file a ~~report~~decision and an order.

(e) *Review by the court.* Either party may seek review of the presiding disciplinary judge's decision.

1. *Appeal.* Within five (5) days after service of a ~~report decision~~ and order of the presiding disciplinary judge, respondent or the state bar may appeal by filing an opening brief with the disciplinary clerk. An answering brief may be filed with the disciplinary clerk no later than five (5) days after service of the opening brief. Briefs shall conform to the requirements of ARCAP 6(c). Briefs shall not exceed ten (10) pages and shall not be bound. The content of the briefs shall conform to ARCAP 13. After the time for filing the appellate briefs has expired, the disciplinary clerk shall transmit the entire record, including any transcripts and the parties' briefs, to the clerk of the court.

2. *Stay pending appeal.* Within five (5) days after service of a ~~report decision~~ and order of the presiding disciplinary judge, a respondent may seek a stay of the decision by filing an application for stay with the disciplinary clerk, along with the opening brief on appeal. The state bar may file a response with the disciplinary clerk, along with the answering brief on appeal, within five (5) days after service of the application for stay. The disciplinary clerk shall transmit the application for stay with the record as set forth in paragraph (e)(1) to the clerk of the court. The court shall promptly rule on the application for stay, which shall not be granted unless good cause is shown.

Rule 63. Transfer to disability inactive status.

(b)(1). *Judicial determinations of incapacity.* If a lawyer has been judicially declared incompetent, incompetent to stand trial, or is voluntarily or involuntarily committed on the grounds of incompetency or other disability or incapacity in a court proceeding, the presiding disciplinary judge, upon motion of bar counsel and proper proof of the fact, shall enter an order ~~of transfer~~ immediately transferring the lawyer to disability inactive status for an indefinite period until further order. A copy of the order shall be personally served upon the clerk of the court, the lawyer, the lawyer's guardian and conservator, and the director of the institution to which the lawyer may have been committed.

2. *Interim order of incapacity.* When it appears to the state bar, the committee, the presiding disciplinary judge, or the hearing panel that a lawyer may be incapacitated to the extent that the lawyer may be causing harm to the public, the legal profession or the administration of justice by reason of a mental or physical condition or because of addiction to drugs or intoxicants, ~~bar counsel may file~~ a motion, setting forth facts to support a prima facie finding of incapacity and accompanied by verification or affidavit, ~~may be filed~~ with the disciplinary clerk, for an order temporarily transferring the lawyer to disability inactive status pending a hearing to determine incapacity as provided in this rule.

3. *Finding of incapacity to discharge duty.* If it is alleged by a lawyer or otherwise appears in the course of a discipline proceeding that the lawyer is incapacitated or impaired by reason of a mental or physical condition or because of addiction to drugs or intoxicants, and the lawyer lacks the capacity to adequately discharge the lawyer's duty to clients, the bar, the courts or the public, a petition may be filed with the disciplinary clerk by bar counsel, on bar counsel's own initiative or upon a recommendation of the ~~the committee, the~~ presiding disciplinary judge, or the lawyer alleged to be incapacitated.

(c) *Proceedings to determine incapacity or competence.*

1. *Petition* A petition requesting transfer to disability inactive status may be filed with the disciplinary clerk by bar counsel, on bar counsel's own initiative or upon a recommendation of the the committee, or the presiding disciplinary judge, or the lawyer alleged to be incapacitated. The petition shall be accompanied by affidavits, reports, or other documentation to support a prima facie finding of incapacity.

5. *Report of presiding disciplinary judge.* Within thirty (30) days after the hearing or filing of the post hearing memorandum ordered hearing transcript or stipulation, the presiding disciplinary judge shall prepare and file with the disciplinary clerk a decision and order report containing findings of fact and conclusions concerning transfer to disability inactive status based on a determination of incapacity to discharge duty or competency to assist in defense. The presiding disciplinary judge shall also serve a copy of the report and the order transferring the lawyer to disability inactive status on the parties. Thereafter, the lawyer shall be transferred to disability inactive status subject to a right to appeal. If a party does not appeal the order of transfer, the presiding disciplinary judge shall notify the court of same by memorandum, and the decision shall be final.

6. *Appeal.* Either party may appeal the presiding disciplinary judge's decision and order regarding transfer of a lawyer to disability inactive status as provided in Rule 59.

3. *Order to show cause.*

A. *Petition.* In the case of a lawyer who has been transferred to disability inactive status, if information comes to the attention of the state bar indicating that good cause no longer exists to maintain a stay imposed pursuant to paragraph (d)(1) of this rule, or that the lawyer appears no longer to be incompetent and a stay imposed pursuant to paragraph (d)(2) of this rule is no longer appropriate, the state bar shall file with the disciplinary clerk a petition for order to show cause.

B. *Hearing.* The presiding disciplinary judge shall issue an order requiring the lawyer to show cause why an existing stay of pending discipline proceedings imposed upon a showing of good cause or upon a finding of incompetency should not be lifted. The only issue to be addressed at the hearing is whether such a stay should be lifted. The burden of proof to maintain the stay shall be upon the lawyer.

C. ~~Report~~ Decision and Order of presiding disciplinary judge. The presiding disciplinary judge shall, as soon as practicable, prepare and file with the disciplinary clerk a report decision containing findings of fact and an order recommendation concerning whether the stay should be lifted. The presiding disciplinary judge shall also serve a copy of the report decision and and order on the parties. Any such order is subject to appellate review by the court. Upon If an order is entered finding that an existing stay is no longer supported by good cause, or upon a if an order is entered finding that a lawyer is no longer incompetent, and if time to appeal has expired, any stayed discipline proceedings shall resume. subject to appellate review by the court.

Rule 72. Notice to clients, adverse parties and other counsel.

(e) **Affidavit filed with hearing panel and court.** Within ten (10) days after the effective date of the judgment of disbarment or suspension, transfer to disability inactive status, or resignation, respondent shall file with the ~~hearing panel~~presiding disciplinary clerk and with the court an affidavit showing: